(10)

No. 98-1904

In the Supreme Court of the United States

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, AND UNITED STATES DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO VACATE THE JUDGMENT OF THE COURT OF APPEALS AND REMAND THE CASE WITH DIRECTIONS TO DISMISS THE CASE AS MOOT

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MOTION TO VACATE THE JUDGMENT OF THE COURT OF APPEALS AND REMAND THE CASE WITH DIRECTIONS TO DISMISS THE CASE AS MOOT

Pursuant to Rule 21.2(b) of the Rules of this Court, the Solicitor General, on behalf of the United States, the Department of Justice, and the Department of State, respectfully moves that the Court vacate the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case to that court with directions to dismiss the case as moot. The case is currently scheduled for oral argument on December 8, 1999.

This case involves a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for a copy of a letter, dated July 28, 1994, sent by the Home Office of the British government to the United States Depart-

ment of Justice concerning the extradition of respondent's client, Sally Ann Croft, and another person from the United Kingdom to the United States, to stand trial on charges of conspiring to murder the United States Attorney for the District of Oregon. The extradition was a sensitive matter between the two nations. The letter from the Home Office was classified and withheld under Exemption 1 of FOIA, 5 U.S.C. 552(b)(1), because it constituted a confidential communication by a foreign government and the breach of that confidentiality by the United States could reasonably be expected to harm the national security. The United States' decision to withhold the document was based, in large part, on the position of the British government (in which our government concurred) that such correspondence between governments is ordinarily confidential and that the letter accordingly should remain confidential.

In his brief on the merits in this Court, filed on November 19, 1999, respondent disclosed for the first time a letter dated November 16, 1994, that he received from the British Consul in Seattle, Washington, that disclosed much of the substance of the letter that is the subject of this FOIA case. We had previously been unaware of the Consul's November 1994 letter, and we asked that it immediately be brought to the attention of the British Home Office. The Home Office reports that, insofar as it has been able to ascertain, neither it nor the Foreign Office in London has any record or recollection of having seen the Consul's letter. In light of that letter, the British government has informed the Department of State that it no longer insists upon maintaining the confidentiality of the July 1994 letter that is the subject of this FOIA suit and, under the circumstances, it has requested that the United States release

the letter. The Department of State concurs in the British government's judgment in light of these new circumstances, and has accordingly declassified the letter and sent a copy to respondent. This case therefore is now moot.

Because of these changed circumstances brought about by respondent's disclosure of the letter at this late stage of the case, the independent action of the British government in light of the letter of its Consul, and the national security context in which this case arises, we request that the Court vacate the judgment of the court of appeals and order that the case be dismissed as moot. That disposition will remove the precedential force of the Ninth Circuit's decision, and thereby will do what is possible to prevent that decision from chilling future confidential communications between the United States and the British government and other foreign governments.

STATEMENT

1. On November 29, 1994, respondent submitted FOIA requests to the Department of Justice and the Department of State for a copy of a letter sent by the British Home Office to the Director of the Justice Department's Office of International Affairs in which the British government "convey[ed] certain concerns of the U.K. Government" regarding the United States' criminal prosecution of respondent's client. Pet. App. 54a; see also *id.* at 2a-3a.[1] As it commonly does, the State Department requested the views of the British

[1] The Justice Department had possession of the letter but, because the letter had been created by a foreign government, it forwarded the letter to the State Department for response to the FOIA request. Pet. App. 3a; see also 28 C.F.R. 16.4(c); 5 U.S.C. 552(a)(6)(B)(iii)(III) (Supp. IV 1998).

government on disclosure. *Id.* at 58a, para. 8. The British government responded that it was "*unable to agree to [the letter's] release*," because "the normal line in cases like this is that all correspondence between Governments is confidential unless papers have been formally requisitioned by the defence." Resp. Br. in Opp. App. 30a; Pet. App. 3a. The British government further explained that, "[i]n this particular case," a request by representatives of the defendants to see the letter had been "refused on grounds of confidentiality" by the British government. Resp. Br. in Opp. App. 30a. The State Department subsequently classified the letter as "confidential" and informed respondent that the letter would not be released because it fell within FOIA Exemption 1. Pet. App. 3a-4a; J.A. 42-43. The Justice Department denied respondent's FOIA request on the same ground. J.A. 50-51.

2. Respondent then filed suit under FOIA, 5 U.S.C. 552(a)(4)(B), to compel release of the letter. The government introduced the declarations of two State Department officials. The Sheils declaration explained that the letter "was intended by the U.K. Government to be held in confidence" and that violation of that "clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments." Pet. App. 52a-53a.

The Kennedy declaration elaborated that "[d]iplomatic confidentiality obtains even between governments that are hostile to each other and even with respect to information that may appear to be innocuous," and "[w]e expect and receive similar treatment from foreign governments." Pet. App. 56a-57a. For that

reason, disclosure of the letter "in violation of the accepted rule of diplomatic confidentiality reasonably could be expected to cause damage to relations between the U.S. and the originating government," because it "may lead not only the government directly affected, but also other governments more generally to conclude that the U.S. cannot be trusted to protect information furnished by them." *Id.* at 57a. The resulting "reluctan[ce]" of other governments "to provide sensitive information to the U.S. in diplomatic communications" would "damag[e] our ability to conduct the foreign relations of the U.S. and our national security, in which information received from foreign government officials plays a major role." *Ibid.* After initially ordering the letter disclosed, the district court reconsidered its decision after undertaking *in camera* review and ruled that the letter was exempt from disclosure under FOIA Exemption 1, 5 U.S.C. 552(b)(1).

3. Respondent appealed. While the appeal was pending, the government in Great Britain changed from the Conservative Party to the Labour Party. The United States inquired whether the new government, like its predecessor, wished to continue to maintain the confidentiality of the letter. The United States was advised that the British government continued to regard disclosure to be "out of the question." As we pointed out in our certiorari petition (at 10 n.4), counsel for the United States informed the court of appeals of the new British government's view in response to a question at oral argument.

4. a. A divided panel of the court of appeals subsequently reversed the district court's judgment and ordered the letter disclosed. Pet. App. 1a-20a. The majority concluded that the "government never met its burden of identifying or describing any damage to

national security that will result from release of the letter." *Id.* at 9a. The court declined to give any deference to the Executive's identification, in the Sheils and Kennedy declarations, of the particular damage to foreign relations that would result from disclosure of the letter, because, in the court's view, the government had failed to make "an initial showing which would justify deference." *Id.* at 16a. The court therefore decided that it should only "look to the individual document itself," not the consequences of a breach of the British government's expectation of confidentiality, in assessing the potential harm to national security. *Ibid.* After reviewing the document *in camera*, the majority labeled the letter "innocuous," stating that the majority "fail[ed] to comprehend how disclosing the letter at this time could cause 'harm to the national defense or foreign relations of the United States.'" *Id.* at 17a. The court accordingly reinstated the grant of summary judgment for respondent. *Id.* at 18a.

b. Judge Silverman dissented, Pet. App. 18a-20a, finding "no basis in the record to conclude otherwise than that * * * release [of the letter] would cause damage to the national security," *id.* at 20a. He emphasized that the government's declarations of confidentiality and harm were uncontroverted and, indeed, were corroborated by the British government's own refusal on grounds of confidentiality to release the letter. *Id.* at 18a-19a.

5. The United States then sought a stay of the Ninth Circuit's mandate, supported by a declaration of the Acting Secretary of State, Strobe Talbott. Pet. App. 60a-64a. He explained that disclosure "could reasonably be expected to cause damage to the foreign relations of the United States" and, in particular, could impair the "general bilateral relationship between the

U.S. and the U.K. on law enforcement cooperation and other matters" by "dealing a setback to U.K. confidence in U.S. reliability as a law enforcement partner." *Id.* at 63a. The court of appeals then stayed the issuance of its mandate. J.A. 6.

6. The United States filed a petition for a writ of certiorari on May 27, 1999. Prior to filing that petition, the Solicitor General again verified, through high-level State Department officials, that the British government continued to be of the view that the letter should not be disclosed.

This Court granted the petition for a writ of certiorari on September 10, 1999. The United States filed its opening brief on October 22, 1999, and respondent filed his brief on November 19, 1999. The government's reply brief is currently due on December 1, 1999, and the case is scheduled for oral argument on December 8, 1999.

7. a. In his brief on the merits filed on November 19, respondent reveals for the first time in this litigation that, on November 16, 1994, the British Consul in Seattle, Washington, wrote respondent a letter in which the Consul disclosed a significant portion of the contents of the letter that is the subject of this case, stating that the letter "stressed the Home Secretary's concern that questions of local prejudice were examined most carefully during the pretrial process." Resp. Br. 38 n.17; see also *id.* at 6, 48-49. We previously were unaware of the November 16, 1994, letter from the British Consul.

Respondent never informed the United States or the district court at any stage of the proceedings that such a disclosure had been made by a British official, despite the fact that the United States' defense of the withholding of the Home Office's July 1994 letter from

respondent under FOIA attached vital importance to the British government's request that the confidentiality of the document be preserved. Respondent again declined to mention the Consul's letter in his motion to set aside the district court's judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, even though that motion turned upon a claim that the British government had disclosed the contents of the letter to an unidentified acquaintance of respondent in a telephone conversation. See Gov't Br. 8 n.5; J.A. 52-56 (affidavit of respondent).

Respondent likewise did not inform the court of appeals of the letter he received from the British Consul—in his briefs; at (or after) the oral argument, when counsel for the government told the court that the new Labour Government regarded disclosure of the letter to be "out of the question"; at the rehearing stage; or when the United States moved to stay the court of appeals' mandate.

Nor did respondent inform this Court, in his brief in opposition to the petition for a writ of certiorari, that an official of the British government had already disclosed significant details about the subject matter of the letter to him.

b. Upon receiving respondent's brief and a copy of his lodging of the Consul's letter, we immediately had a copy of that letter brought to the attention of the British Home Office. The Home Office has responded in the attached letter, dated November 23, 1999, to the Department of State. App. A, *infra*, 1a-2a. The Home Office's letter states that, insofar as the Home Office has been able to ascertain, neither that Office nor the Foreign Office had previously seen the letter sent to respondent by the British Consul in Seattle. The letter goes on to reiterate the British government's position

that it "does continue to attach great importance, as I know does the U.S. Government, to according the highest measure of confidentiality to communications between our two Governments." App. A, *infra*, 1a. "Without prejudice to that important principle," however, the Home Office states that, in view of the previous partial disclosure of the contents of the July 1994 letter by the British Consul, the Home Secretary and Foreign Secretary have determined that the British government no longer insists upon maintaining the confidentiality of that letter and therefore "believe that an exception to the normal rule of confidentiality for such intergovernmental communications should be made." *Ibid.* Accordingly, the Home Office has informed the Department of State that the British government no longer has an objection to release of the letter to respondent and that, under the circumstances, it requests that a copy of the letter be furnished to him.

In light of respondent's disclosure of the letter he received from the British Consul, his lodging of the Consul's letter with this Court as a matter of public record, and the request by the Home Office and Foreign Office that the July 1994 letter to the Department of Justice be released now that they have learned of the disclosure by the British Consul, the State Department has determined that disclosure of the letter no longer could reasonably be expected to cause damage to the national security. See Exec. Order No. 12,958 § 1.3(a)(3) (3 C.F.R. 333 (1996)). As reflected in the attached documents, the State Department accordingly has declassified the letter and has sent a copy to respondent through his FOIA counsel, Mr. Gregory Workland.

ARGUMENT

The foregoing developments, which have compelled the United States to conclude that it must release the letter to respondent, render this case moot. See, *e.g.*, *Anderson* v. *United States Dep't of Health & Human Servs.*, 3 F.3d 1383, 1384 (10th Cir. 1993) (agency's disclosure of requested documents moots FOIA case); *Tijerina* v. *Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987) (agency's disclosure to requester of the material sought under FOIA renders the case moot because the court has "no further judicial function to perform under the FOIA"). In the absence of a continuing controversy between the United States and respondent, the case is nonjusticiable under Article III of the Constitution. See, *e.g.*, *Preiser* v. *Newkirk*, 422 U.S. 395, 401-402 (1975). An actual controversy must exist at all stages of appellate review, including in this Court. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 21 (1994).

If a case becomes moot pending this Court's review, "this Court may not consider its merits, but may make such disposition of the whole case as justice may require." *Bonner Mall*, 513 U.S. at 21. "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot * * * pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 22 (quoting *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Vacatur in such circumstances "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. As we explain below, vacatur of the court of

appeals' judgment is particularly appropriate in this case. Accordingly, the judgment of the court of appeals should be vacated and the case remanded to that court with directions to order the vacation of the district court's judgment and the dismissal of the case as moot. See *Anderson* v. *Green*, 513 U.S. 557, 560 (1995) (per curiam) (ordering that disposition of a moot case).

1. Vacatur is appropriate first because "unilateral action of the party who prevailed in the lower court" has denied the United States the opportunity to seek review of the Ninth Circuit's judgment. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 72 (1997) (quoting *Bonner Mall*, 513 U.S. at 23). Respondent's prolonged and inexplicable failure—until his merits brief in this Court—to disclose that an official of the British government had revealed to him significant details about the subject matter of the classified letter forced the United States, the district court, the court of appeals, and this Court at the petition stage to adjudicate this FOIA case "upon a record improperly made up." *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 268 (1936). Furthermore, having undertaken the extraordinary step of attempting to place before this Court factual information that is not newly discovered and is outside the record,[2] respondent cannot deny the

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[2] See, *e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157-158 n.16 (1970) ("Manifestly, it [an unsworn statement of a witness] cannot be properly considered by us in the disposition of the case."); *Russell* v. *Southard*, 53 U.S. 139, 159 (1851) ("It is very clear that affidavits of newly-discovered testimony cannot be received for such a purpose . This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting as an appellate tribunal. And,

obvious relevance of the Consul's letter to his FOIA request and to the government's defense.

Respondent's attempt (Br. 38 n.17) to justify his tardy revelation of the Consul's letter as prompted by a need to respond to the statement in our brief on the merits in this Court (at 10 n.6) that the Labour Party government opposed disclosure is entirely without merit. The footnote, which appeared in our petition (at 10 n.4) as well as our merits brief, stated that counsel for the government had informed the *court of appeals* during oral argument that the then-newly installed Labour government, like its predecessor, considered disclosure to be out of the question.[3] Respondent fails to explain why, if he considered disclosure of the Consul's letter to be properly responsive to the government's notification of the new Labour government's views, he did not introduce the Consul's letter into the record or even refer to it (1) during his rebuttal argument in the court of appeals, (2) in a supplemental brief calling the court of appeals' attention to the letter, (3) in his response to the government's petition for rehearing and suggestion of rehearing en banc, (4) when the government sought a stay of the mandate in the court

according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal.").

[3] The Labour government's view on disclosure obviously could not have been obtained earlier by the United States because there was no Labour government until May 1997, at which point the case was already pending before the court of appeals. The information was offered, moreover, in response to a question from the court, rather than unilaterally volunteered by counsel for the government. Respondent, by contrast, has been in possession of the Consul's letter since before he filed his FOIA request and offers the information now of his own initiative.

of appeals, or (5) in his brief in opposition to our petition for a writ of certiorari in this Court. See Pet. 10 n.4.[4]

It is respondent's sudden revelation of information that he has possessed since before the litigation commenced that prompted the British government's change in position about maintaining the confidentiality of the Home Office's July 1994 letter to the Department of Justice and thus set in motion developments that have led to release of the letter. As the British government's and the United States' reaction to the Consul's letter evidence, had respondent disclosed the letter earlier, this litigation would have either never commenced or terminated long before our petition to this Court. In *Arizonans for Official English*, this Court concluded that a respondent's failure to disclose to the court of appeals information that would have mooted her case merited vacatur. "It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment" through the suppression of important information, "take voluntary action [that] moot[s] the dispute, and then retain the [benefit of the] judgment." 520 U.S. at 75 (this Court's brackets); see also *Bonner Mall*, 513 U.S. at 26 (noting "the emphasis on fault in our decisions" regarding vacatur). Nor will vacatur of the court of appeals' judgment harm respondent, since the letter that he sought to obtain in this FOIA action has now been released to him.

2. It also is significant that release of the letter to respondent has been occasioned by the independent

[4] For purposes of the record before this Court, the government's representation to the court of appeals is as much a part of the record as the portion of the oral argument transcript that respondent cites to support his merits arguments. See Resp. Br. 12 n.9.

decision of the British government following respo
dent's recent disclosure, not by unilateral and voluntar
action of the Department of State and the Departme
of Justice, which are the parties to this litigation. S
Anderson v. *Green*, 513 U.S. at 560 (distinguishi
Bonner Mall and ordering vacatur because the par
seeking relief from the judgment below did not cau
nonjusticiability by voluntary action). The decision
the Department of State to classify the Home Offic
letter to the Department of Justice was based in lar
part on the British government's request that the usu
confidentiality of such correspondence between gover
ments be maintained in this case. As explained abo
(see pp. 4-7, *supra*) and in our opening brief (at 5-8, 1
11, 27-50), the State Department properly determin
that release of the letter in contravention of the Briti
government's expectation of confidentiality reasonab
could be expected to damage the national security
the United States by undermining the trust of t
British government and other foreign governments
the confidentiality of their communications with t
United States.

The unilateral decision by the British Home Of
and Foreign Office, once they learned of the Nov
16, 1994, letter from the British Consul, to re
British government's request to the Dep
State that the letter be kept confidentia
their request that the United States
letter—fundamentally altered the
derlying the State Department's
decision and required a fresh de
ernment. Thus, it is the Bri
in light of respondent's
deprived the United St
this Court review th

holding denying deference to Executive Branch declarations in a national security exemption case. See Pet. 12-20. That decision by the British government also leaves the United States unable to seek review on the merits in this Court of the Ninth Circuit's determination that the Executive Order does not permit classification based on the harm arising from the very act of disclosure, even though that judgment was made without any deference to the Executive Branch's interpretation of its own Executive Order. See Pet. 21-28. The consequences of the combined actions of respondent and the British government should not be visited upon the United States government and the foreign relations and national security interests of this country. See *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916) ("[T]he ends of justice exact that the judgment below should not be permitted to stand when without any fault of the government there is no power to review it upon the merits.").

3. The adverse consequences for the national security of the erroneous ruling by the court of appeals extend well beyond the circumstances of this case; they threaten the same harm to the foreign relations of the United States generally that led the United States to request review by this Court in the first place. In *Arizonans for Official English*, this Court recognized that federalism concerns were properly factored into the equitable analysis of whether a lower-court judgment should be vacated once a case has become moot. 520 U.S. at 75. The court of appeals' judgment here implicates equally fundamental concerns going to the structure of our government. As explained in our petition and opening brief, the Ninth Circuit held that no deference was owed to the Executive Branch officials' expla-

nation of the basis for classification of the British government's letter, because deference was not "justif[ied]" by an unspecified "initial showing," and because the harm identified by State Department officials did not fall within the court's own straitened view of what constitutes damage to the national security. Pet. App. 13a-14a, 16a. However, the Executive Branch's "authority to classify and control access to information bearing on national security * * * flows primarily from th[e] constitutional investment of power in the President * * * as head of the Executive Branch and as Commander in Chief," and thus "exists quite apart from any explicit congressional grant." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). For that reason, unlike the Ninth Circuit here, "courts traditionally have been reluctant to intrude upon the authority of the Executive" over the management of national security information, because of "the generally accepted view that foreign policy [is] the province and responsibility of the Executive." *Egan*, 484 U.S. at 529-530 (quoting *Haig* v. *Agee*, 453 U.S. 280 293-294 (1981)). With respect to that area of Presidential responsibility, "the courts have traditionally shown the *utmost deference*." *Egan*, 484 U.S. at 530 (emphasis added) (quoting *United States* v. *Nixon*, 418 U.S. 683, 710 (1974)); accord *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (quoted at Gov't Br. 21); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803). Accordingly, "[e]ven if there is some room for the judiciary to override the executive determination [on classification], it is plain that the scope of review must be exceedingly narrow." *New York Times Co.* v. *United States*, 403 U.S. 713, 758 (1971) (Harlan, J., dissenting). The court of appeals thus construed its role under FOIA in a manner that creates not only a conflict

in the circuits but serious separation of powers concerns.

The court of appeals' decision refusing to afford any deference to the conclusion of Executive Branch officials that the harm to national security against which the Executive Order protects includes the harm arising from the very act of disclosure likewise exceeded the proper boundaries of judicial review and, if permitted to stand, would significantly handicap the government's ability to protect foreign government communications. In *Haig* v. *Agee*, for example, this Court recognized that "the Government has a compelling interest in protecting both the secrecy of information important to our national security and the *appearance of confidentiality* so essential to the effective operation of our foreign intelligence service." 453 U.S. at 307 (emphasis added). "[I]t is elementary that the successful conduct of international diplomacy * * * require[s] both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept." *New York Times Co.*, 403 U.S. at 728 (Stewart, J., concurring).

Vacatur of the court of appeals' now unreviewable judgment is thus of great importance to the Executive Branch's ability to conduct foreign relations and administer its own Executive Order in a manner that protects vital diplomatic interests. In the absence of a single, uniform rule governing the standard of deference owed Executive Branch classification decisions under Exemption 1, FOIA plaintiffs will have an incentive to file suit within the circuit that accords classification judgments the least amount of deference. From a practical perspective, a lack of cohesion in the judicial standards governing review of classification

decisions by the Executive will deny Executive Branch officials and foreign governments a stable framework within which to engage in candid exchanges of diplomatic information, thereby creating a real danger of "restricting the flow of essential information to the Government." *FBI* v. *Abramson*, 456 U.S. 615, 628 n.12 (1982). It will be of little solace to those United States diplomats whose assurances of confidentiality would be rendered empty promises under the Ninth Circuit's decision—or to foreign governments whose secrets would be exposed within the Ninth Circuit—that their expectation of confidentiality might have carried the day in another region of the United States. From the foreign government's perspective and from ours, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981).

Relatedly, the prospect that courts may make their own independent judgments about maintaining the confidentiality of national security information—either because deference is not deemed to have been "justif[ied]" through an unspecified "initial showing" in a particular case, or because of a disagreement with the Executive Branch about the causes and nature of damage to foreign relations that may be taken into account—would have an immediate and deleterious impact on the Executive's conduct of diplomatic and other foreign relations. As in *CIA* v. *Sims*, 471 U.S. 159 (1985), there is little reason for foreign governments "to have great confidence in the ability of judges" to make the "complex political [and] historical" judgments that underlie classification decisions, since judges "have little or no background in the delicate business" of foreign diplomacy. *Id.* at 176. In particular, if foreign

governments cannot be assured that their communications with the United States will enjoy meaningful protection from disclosure and that they will, as a result, be spared the risks to their interests that may attend such exposure, they are likely to "close up like a clam," *id.* at 172, leaving the United States unable to obtain the information it so critically needs for the conduct of its foreign relations. The protection accorded confidences of the United States government by other nations may well be eroded in turn. Given the "changeable and explosive nature of contemporary international relations," *Haig*, 453 U.S. at 292, and the breach of trust that disclosure of a foreign government's confidences would occasion in foreign relations generally and in the delicate arena of international law enforcement, "the vagaries of circumstances" beyond the United States' control—and largely within the control of respondent—should not force the United States "to acquiesce" in the court of appeals' judgment and the harms it threatens to national security. *Bonner Mall*, 513 U.S. at 25; see also *Munsingwear*, 340 U.S. at 41 (vacatur necessary "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences").

* * * * *

For the foregoing reasons, the Court should vacate the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case to that court with directions to order the vacation of the judgment of the district court and the dismissal of the case as moot.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID R. ANDREWS
Legal Adviser
Department of State

NOVEMBER 1999

APPENDIX A

[Seal Omitted]

HOME OFFICE

Judicial Co-operation Unit
50 Queen Anne's Gate, London SW1H 9AT
Switchboard: 0171 273 4000 Fax: 2496 Direct Line: 0171 273 3060

Our reference:

HONORABLE PATRICK F. KENNEDY
Assistant Secretary of State
U.S. Department of State
2201 C Street
Washington, D.C. 20520-0001

Your reference:

Date: 23 November 1999

Dear Mr. Kennedy

WEATHERHEAD V. UNITED STATES: HOME OFFICE LETTER OF 28 JULY 1994

We are grateful to United States authorities for drawing to our attention a letter of 16 November 1994 from the British Consul in Seattle to Mr. Leslie Weatherhead, Attorney at Law, about the extradition to the United States in July 1994 of Sally Hagan and Susan Croft. Insofar as we have been able to ascertain, the Home Office and the Foreign and Commonwealth Office here in London had not seen that letter before. That letter in turn refers to the Home Office's letter of 28 July 1994, which both we and the US Government heretofore have declined to release.

The UK Government does continue to attach great importance, as I know does the US Government, to according the highest measure of confidentiality to communications between our two Governments. That, of course, is the context within which primarily falls to be considered the question of disclosing the Home Office letter of 28 July 1994.

Without prejudice to that important principle, however, we have now reflected on the contents of that letter in the light of the British Consul's letter of November 1994. In view of that previous partial disclosure of the contents of the 28 July 1994 letter, the Home Secretary and the Foreign Secretary do not insist upon maintaining the confidentiality of that letter and therefore believe that an exception to the normal rule of confidentiality for such intergovernmental communications should be made.

Accordingly, we have no objection to disclosure by the United States, and under the circumstances, would ask you to furnish a copy of it to Mr. Weatherhead.

Yours sincerely,

/s/ BOB WOOD
BOB WOOD
Extradition Section

On behalf of the Secretary of State

APPENDIX B

[Seal Omitted] United States Department of State

Washington, D.C. 20520

November 23, 1999

Gregory Workland, Esq.
W. 421 Riverside, Suite 317
Spokane, Washington 99201

Dear Mr. Workland:

In further reference to the referral under the Freedom of Information Act from the Department of Justice, the enclosed document originated by the British Home Office is released in its entirety.

Sincerely,

/s/ MARGARET P. GRAFELD
MARGARET P. GRAFELD
Director
Office of IRM Programs and Services

[redacted] OFFICE
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Dept. of State, RPS/IPS, Margaret P. Grafeld, Dir.
( ) Release ( ) Excise ( ) Deny (X) Declassify
Date 11-23-99 Exemption [redacted]

CONFIDENTIAL [redacted] Your reference

UNCLASSIFIED Our reference

Date

28 July 1994

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D 1.5 b (d)

George W Proctor Esq
Director
US Department of Justice
Office of International Affairs
Criminal Division
Bond Building, Room 5100
1400 New York Avenue, NW
WASHINGTON DC 20005

28 July 1994

Dear Mr Proctor

EXTRADITION OF SUSAN HAGAN AND SALLY CROFT TO THE UNITED STATES

Following the return of Susan Hagan and Sally Croft to the United States yesterday, there are a number of aspects of the case about which we have undertaken to write to you.

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For the record, and as I believe your office is already aware, there is no English equivalent to the US offence of interstate transportation of firearms which appears in the US indictment. Thus by virtue of Article XII of the UK/US Extradition Treaty Ms Hagan and Ms Croft cannot be detained or proceeded against in the United States in respect of that offence.

As you will know Ms Hagan and Ms Croft and others, including prominent members of both Houses of Parliament, have expressed fears that they will not receive a fair trial in Oregon because of the age of the alleged offence, the nature of the evidence against them (obtained, so it appears, from plea bargains), and alleged continuing prejudice against members or former members of the Rajneesh community. Ms Hagan and Ms Croft had asked the Home Secretary to seek an undertaking from the United States Government that the place of trial be moved to another, neutral, state. The Home Secretary declined to do so because the place of trial is, of course, for the US authorities to decide. However, he did undertake to pass these concerns on to the US authorities, and this letter fulfils that commitment.

Although judgement went strongly against Ms Hagan and Ms Croft on 27 July (we shall send you a copy as soon as a transcript is available), we would wish to stress the Home Secretary's concern that questions of local prejudice are examined most carefully by all those concerned in the trial process. This case has attracted an unprecedented degree of Parliamentary, public and media attention in this country. There will inevitably continue to be a great deal of concern expressed about the case by supporters of Ms Hagan and Ms

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DEPARTMENT OF STATE IS/FPC/CDR [redacted] 6/21/95
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Citations 1.5(b),(d)
TB authority is [redacted]
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Croft, both inside and outside Parliament. There are highly likely to be Parliamentary debates about it in October or November, after the summer Recess, possibly resulting in votes condemning the Home Secretary's actions. The British Consul in Seattle will be taking a close interest in the progress of the trial. But particularly in view of the almost inevitable Parliamentary debates, I would be most grateful if you would ensure that we are kept in very close touch with developments.

Yours sincerely

Alison Rutherford

ALISON RUTHERFORD

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